

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

SEP 28 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In re

Amendment of Part 74 of the  
Commission's Rules with Regard  
to the Instructional Television  
Fixed Service

MM Docket No. 93-24

DOCKET FILE COPY ORIGINAL

To: The Commission

REPLY COMMENTS OF AMERICAN TELECASTING, INC.

1. American Telecasting, Inc. ("ATEL"), by its attorneys, hereby submits its Reply Comments in response to the Commission's Order and Notice of Proposed Rulemaking, FCC 94-148, released July 6, 1994, in the above-referenced proceeding ("NPRM"). Therein, the Commission examined its rules and policies governing the acceptance and processing of applications for new and major changes to Instructional Television Fixed Service ("ITFS") stations.

2. The great majority of the comments submitted in this proceeding support the Commission's effort to revise and improve the ITFS application process.<sup>1/</sup> ATEL, in accordance with most of the comments submitted in this proceeding, believes that many of the changes proposed by the Commission in the NPRM should be adopted without delay. These changes would result in a decrease in both the nature and the frequency of abuses to the Commission's processes by speculative ITFS applicants and licensees. In turn,

<sup>1/</sup> In fact, only one commenter, Hispanic Information and Telecommunications Network, Inc. ("HITN"), believes that most of the Commission's proposals to revise the ITFS Rules will have the effect of "limiting the field of potential applicants" and "will increase, not decrease, the processing burden on the FCC." See Comments of HITN at 2.

No. of Copies rec'd  
List A B C D E

045

applications would be processed quicker and service to the public could begin sooner. ATEL reiterates its support of the Commission's proposals in these Reply Comments.

I. DISCUSSION

A. Window Filing System

3. ATEL, along with a majority of the commenters in this proceeding, supports the Commission's proposal to adopt a window filing system to replace the current A/B cut-off system for the submission of new ITFS applications, applications seeking major changes to existing facilities and major amendments to pending applications. Such a filing window system would both discourage the filing of speculative ITFS applications and speed up the Commission's processing and grant time.<sup>2/</sup>

---

<sup>2/</sup> See Comments of ATEL at 2; Comments of ACS Enterprises, Inc., CableMaxx, Inc., Multimedia Development Corp., Rapid Choice TV, Inc., Superchannels of Las Vegas, Inc. and Wireless Holdings, Inc. ("Coalition") at 3-5; Comments of the American Council on Education, Arizona Board of Regents for Benefit of the University of Arizona, California State University - Sacramento, Instructional Telecommunications Consortium of the American Association of Community Colleges, Kirkwood Community College, St. Louis Regional Education and Public Television Commission, South Carolina Educational Television Commission, State of Wisconsin - Education Communications Board, University of Maine System, University of Wisconsin System and University System of the Ana G. Mendez Educational Foundation (the "Educational Parties") at 8-11; Comments of Central Texas Wireless TV, Inc. ("CT") at 3; Comments of the Clarendon Foundation at 1; Comments of Hardin and Associates, Inc. ("Hardin") at 1; Comments of Heartland Wireless Communications, Inc. ("Heartland") at 2-3; Comments of North American Catholic Education Programming Foundation, Inc., Network for Instructional TV, Inc. and Shekinah Network (the "Nationals") at 7-8; Comments of National Micro Vision Systems, Inc. ("NVMS") at 1; Comments of Pioneer Telephone Cooperative, Inc. ("Pioneer") at 1; Comments of RuralVision South, Inc. and RuralVision Central, Inc. ("RuralVision") at 2; Comments of the Wireless Cable Association International, Inc. ("WCAI") at 5-8.

4. In addition, many of the parties, including ATEL, have suggested that the Commission implement a regular schedule of filing windows, spaced every three months.<sup>3/</sup> Such a system would bring predictability to the Commission's processes, ensuring that applications would be better prepared, because applicants would not need to rush through completion of ITFS applications if they knew far enough in advance when a filing window was going to open. If a potential applicant were to miss the current filing window, it would be able file during the next one. In addition, only the very first filing window would bring an onslaught of applications. After that, there would likely be a steady stream of applications, but not a mad rush.<sup>4/</sup> This would mean a more predictable work flow for the Commission's staff.

5. None of the comments submitted in this proceeding indicated that any of the members of the ITFS industry were not supportive of the Commission's adoption of a filing window system to replace the current A/B cutoff system. In order to facilitate increased public service, the Commission should adopt this new filing window system without any delay.

---

<sup>3/</sup> See Comments of ATEL at 2; Comments of CAI Wireless Systems, Inc. ("CAI") at 8; Comments of the Coalition at 4; Comments of the Educational Parties at 9-10; Comments of Heartland at 2-3; Comments of the Nationals at 8; Comments of WCAI at 7-8. See also Comments of Hardin at 1 (suggesting prior announcement of imminent filing windows).

<sup>4/</sup> See Comments of ATEL at 2-3. See also Comments of the Educational Parties at 10.

B. Financial Qualifications

6. ATEL, along with many of the commenting parties, supports the Commission in its belief that it must take some action to revise the financial qualification certification section of ITFS applications, in order to ensure that applicants are not speculators. ATEL, as well as many of the other commenters, believes that the Commission should adopt procedures similar to the broadcast financial certification procedures to be certain that ITFS applicants are financially qualified.<sup>5/</sup>

7. In order to further limit the number of speculative applications filed by applicants with no financial means to construct and operate their facilities, who apply only in order to "shop around" their channels, yet not increase the burdens upon either Commission staff or applicant resources, ATEL suggests that the Commission adopt a process whereby applicants are subject to random checks of financial qualifications by Commission staff.<sup>6/</sup> Such applicants may also be required to submit documentation and information to support its certification of its financial qualifications.<sup>7/</sup> The Commission should also revise FCC Form 330 to indicate that this is the process that will be employed,<sup>8/</sup> to ensure that applicants completely understand the importance of the financial qualification certification.

---

<sup>5/</sup> See Comments of ATEL at 5-7; Comments of CAI at 3.

<sup>6/</sup> See Comments of ATEL at 6.

<sup>7/</sup> See Comments of ATEL at 6.

<sup>8/</sup> See Comments of ATEL at 6.

8. In addition, ATEL and other commenters have suggested that the Commission require certification of financial qualification by any entity who has agreed to provide support for the operation and construction of the proposed facility.<sup>9/</sup> This, too, would discourage involvement by speculators.<sup>10/</sup>

C. Application Caps

9. While ATEL agrees with the Commission that adoption of a cap on the number of applications that can be filed will assist in limiting the number of speculative applications, ATEL also appreciates the Commission's concern that application caps could retard the development of ITFS systems.<sup>11/</sup> Therefore, ATEL, as well as many of the other commenting parties, has suggested certain exemptions from the application cap. These exemptions should include applications for facilities that are already bound by contract to be part of a wireless cable system and are therefore, clearly not speculative; and applications for modification of existing facilities, which are, by their nature, not

---

<sup>9/</sup> See Comments of ATEL at 7; Comments of the Coalition at 7; Comments of the Nationals at 2; Comments of WCAI at 19-22.

<sup>10/</sup> In its Comments (at 3-4), Ruralvision vigorously opposes adoption of the proposal to revise the financial certification procedure by ITFS applicants. In light of Ruralvision's history before the Commission, ATEL submits that its opposition to this proposal most eloquently argues for its adoption.

<sup>11/</sup> See Comments of ATEL at 7.

speculative.<sup>12/</sup> Such an exemption would permit processing of those applications most likely to provide service to the public.

D. Expedited Consideration of Applications

10. In order to expedite the provision of service to the public, the Commission has suggested, and many commenters support, the adoption of a procedure whereby applications would be given expedited consideration in exchange for their agreeing to expedited construction and operation and service to the public.<sup>13/</sup> In order to ensure that requests for expedited consideration do not cause increased backlogs, the Commission should limit such requests to facilities that are bound by contract to become part of a legitimate wireless cable system, and are therefore more likely to expeditiously be constructed.<sup>14/</sup> Such a procedure would accelerate service to the public and would, therefore, be in the public interest.

E. Assignment of Construction Permits

11. If the Commission were to limit the allowable consideration for assignment of construction permits to the applicant's out-of-pocket expenses, there would be less financial

---

<sup>12/</sup> See Comments of ATEL at 8-9; Comments of CAI at 6-7; Comments of Heartland at 7; Comments of the Coalition at 9 (no caps on modification applications); Comments of WCAI at 23-24. See also Comments of CT at 6 (suggesting expedited consideration be limited to applicants proposing service to rural areas).

<sup>13/</sup> See Comments of ATEL at 9-10; Comments of the Coalition at 10-11; Comments of the Educational Parties at 16; Comments of Hardin at 1; Comments of Heartland at 8, Comments of the Nationals at 3-4.

<sup>14/</sup> See Comments of ATEL at 9-10; Comments of CAI at 2; Comments of Pioneer at 2.

incentive for speculators to apply for ITFS licenses,<sup>15/</sup> because there would be no possibility of making a profit before completion of construction. In addition, if the Commission were to similarly limit the allowable consideration for dismissal of an ITFS application, speculators would have even less reason to apply for ITFS licenses.<sup>16/</sup> The Commission should also similarly limit financial recovery by third parties in order to ensure that speculators cannot extort higher sums from legitimate applicants in addition to out-of-pocket expenses paid to the applicant school.<sup>17/</sup>

F. Frequency Offset

12. While ATEL agrees with the Commission that requiring mutually exclusive ITFS applicants to utilize frequency offset to eliminate harmful interference would serve the public interest,<sup>18/</sup> it suggests that the Commission choose a standard greater than the 28 dB D/U ratio presently applied to ensure interference is

---

<sup>15/</sup> See Comments of ATEL at 10-11; Comments of the Coalition at 10; Comments of CT at 7; Comments of the Educational Parties at 17; Comments at WCAI at 29.

<sup>16/</sup> See Comments of ATEL at 10-11.

<sup>17/</sup> See Comments of ATEL at 10-11.

<sup>18/</sup> See Comments of CT at 8; Comments of Hammett and Edison, Inc. ("Hammett") at 2; Comments of Heartland at 10; Comments of RuralVision at 8.

decreased.<sup>19/</sup> ATEL agrees with the WCAI's recommendation that a ratio of at least 39 dB be applied as the standard.<sup>20/</sup>

G. Major Modifications

13. ATEL, along with many other commenting parties in their support of the Commission's proposal to specifically define which changes to ITFS changes will be major, has suggested that the best way to improve the process would be for the Commission to conform the ITFS rule with the pertinent MDS rules.<sup>21/</sup> Such action would be sensible considering the Commission's recent consolidation of both ITFS and MDS in the Mass Media Bureau, the integration of ITFS and MDS facilities in wireless cable systems and the technical relationship between such facilities.<sup>22/</sup>

14. HITN claims that changing the classification of modifications will "only slow the licensing process further."<sup>23/</sup> However, it seems clear that revising the definition of major and minor modifications in the manner suggested by ATEL and other parties would streamline and expedite the process.

---

<sup>19/</sup> See Comments of ATEL at 11-12; Comments of the Educational Parties at 18; Comments of WCAI at 30-31.

<sup>20/</sup> See Comments of WCAI at 30-31.

<sup>21/</sup> See Comments of ATEL at 12-13; Comments of the Coalition at 155; Comments of Hardin at 3; Comments of Hammett at 2; Comments of WCAI at 39.

<sup>22/</sup> See Comments of ATEL at 12-13.

<sup>23/</sup> See Comments of HITN at 5.



H. Reasonable Assurance of Receive Sites

15. In order to limit the ability of applicants to request interference protection for receive sites that they can not possibly serve just to increase their protected service area, ATEL agrees with the Commission that some distance limit must be imposed.<sup>24/</sup> However, ATEL suggests that instead of imposing an absolute 35 mile limit for receive sites, the Commission should make such a limit a rebuttable presumption, subject to a showing that the site can actually receive the programming of the proposed station.<sup>25/</sup>

16. In addition, ATEL agrees with the Commission that receive sites must be required to submit letters from an authorized official of the school that operates the site confirming that it has agreed to and intends to receive programming.<sup>26/</sup> Contrary to HITN's allegations, receive site letters often do not indicate that the receive site actually intends to receive the programming.<sup>27/</sup>

---

<sup>24/</sup> See Comments of ATEL at 13-14; Comments of CAI at 4; Comments of the Vermont Wireless Coop at 1.

<sup>25/</sup> See Comments of ATEL at 13; Comments of the Coalition at 14; Comments of Hardin at 3; Comments of Heartland at 11; Comments of the Nationals at 4. See also Comments of RuralVision at 12-13 and Comments of WCAI at 38 suggesting that the Commission require technical feasibility demonstration for all receive sites.

<sup>26/</sup> See Comments of ATEL at 14; Comments of the Coalition at 17; Comments of CT at 9-10; Comments of the Educational Parties at 19-20; Comments of Hardin at 1; Comments of NVMS at 3.

<sup>27/</sup> See Comments of HITN at 5.

I. Accreditation of Applicants

17. While ATEL agrees that an applicant should be required to identify which of its member schools and/or receive sites are accredited, ATEL does not believe that interference protection should be limited to accredited receive sites.<sup>28/</sup> Often, the educational programming of accredited institutions is viewed at distant, non-accredited sites by students who receive credit from the accredited institution. The Commission's proposal denies the legitimacy of this.

J. Cable/ITFS Negative Covenants

18. In 1990, the Commission amended its ITFS and MDS rules to generally prohibit cable companies from utilizing ITFS and MDS channels within their cable service areas. In so acting, the Commission concluded that "such use eliminates the potential for a significant competition to the incumbent cable system.... At this time, wireless cable service is one of the most imminent sources of such competition." Report and Order in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410, 6417 (1990).

19. Thus, Sections 74.931(h) and 21.912 of the Rules seek to prevent monopolization of excess ITFS channel capacity by coaxial cable operators. By the ITFS rule, a cable operator generally may not lease excess channel capacity over an ITFS station whose main transmitter is within 20 miles of the cable company's franchise or

---

<sup>28/</sup> See Comments of ATEL at 13; Comments of the Coalition at 18; Comments of the Educational Parties at 24; Comments of Hammett at 3; Comments of the Nationals at 6-7; Comments of RuralVision at 17-18; Comments of WCAI at 34-37.

service area. Section 21.912 of the MDS rules similarly prohibits a cable company from acquiring a license or lease for an MDS station whose protected service area overlaps its franchise area.

20. Although these rules have prevented certain anti-competitive practices by cable operators, such operators have achieved the same improper result in other ways. Specifically, ATEL has encountered situations in which a local cable company has contracted with a local school to apply for ITFS channels in a particular market. The cable operator agrees to finance the application process and the construction and operation of the ITFS facility in exchange for the school's agreement not to lease excess channel capacity to any commercial entity (i.e., a wireless cable operator). The intent of the cable operator is to restrict its competition by limiting access of a wireless cable operator to vital ITFS channels, thus preventing it from amassing the necessary channels to compete for video programming subscribers.

21. For this reason, ATEL urges the Commission to amend Section 74.931 to prevent such abusive practices by cable operators.<sup>29/</sup> Specifically, the Rule should prohibit such negative covenants in ITFS lease agreements between cable operators and existing or prospective ITFS licensees. Such action by the Commission will ensure the continued development of viable competition to cable operators by the wireless cable industry, a result in the public interest.

---

<sup>29/</sup> The Commission should consider a similar modification to Section 21.912 in the context of its upcoming review of its MDS rules.

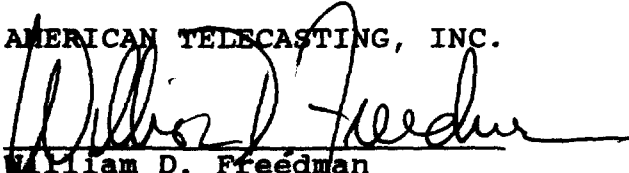
II. CONCLUSION

22. For the foregoing reasons, ATEL supports many of the changes proposed by the Commission in its NPRM. The majority of the commenters also support the Commission's proposals as a way to deter speculators, accelerate the processing of ITFS applications and further the public interest by accelerating and increasing service to the public.

Respectfully submitted,

AMERICAN TELECASTING, INC.

By:

  
William D. Freedman  
Nadja S. Sodos

Gurman, Kurtis, Blask & Freedman,  
Chartered  
1400 16th Street, N.W., Suite 500  
Washington, D.C. 20036  
(202) 328-8200

Its Attorneys

September 28, 1994

**CERTIFICATE OF SERVICE**

I, Lilly A. Whitney, a secretary in the law offices of Gurman, Kurtis, Blask and Freedman, Chartered, do hereby certify that I have on this 28th day of September, 1994, had copies of the foregoing "REPLY COMMENTS OF AMERICAN TELECASTING, INC." mailed by U.S. first class mail, postage prepaid, to the following:

Paul J. Sinderbrand, Esquire  
Sinderbrand & Alexander  
888 Sixteenth Street, N.W.  
Suite 610  
Washington, D.C. 20006-4103

Frederick M. Joyce, Esquire  
Christine McLaughlin, Esquire  
Joyce & Jacobs  
2300 M Street, N.W.  
Suite 130  
Washington, D.C. 20037

Todd D. Gray, Esquire  
Dow, Lohnes & Albertson  
1255 Twenty-third Street, N.W.  
Suite 500  
Washington, D.C. 20037

Benjamin Perez, Esquire  
Abacus Communications Company  
1801 Columbia Road, N.W.  
Suite 101  
Washington, D.C. 20009

Marci E. Greenstein, Esquire  
Lukas, McGowan, Nace & Gutierrez, Chartered  
1111 19th Street, N.W.  
Suite 1200  
Washington, D.C. 20036

Frank M. Sahlman, Sr., President  
Vermont Wireless Coop  
5 Fairground Road, P.O. Box 268  
East Corinth, Vermont 05040

William F. Hammett, P.E.  
Hammett & Edison, Inc.  
Box 280068  
San Francisco, California 94128-0068

T. Lauriston Hardin, P.E.  
Hardin and Associates, Inc.  
5750 Chesapeake Boulevard  
Suite 303  
Norfolk, Virginia 23513-5325

Kemp R. Harshman, President  
Clarendon Foundation  
4201 South 31st Street  
Suite 826  
Arlington, Virginia 22206

Michael Lynch, President  
National Micro Vision Systems, Inc.  
17138 Von Karman  
Irvine, California 92714

Caressa D. Bennet, Esquire  
1831 Ontario Place, N.W.  
Suite 200  
Washington, D.C. 20009

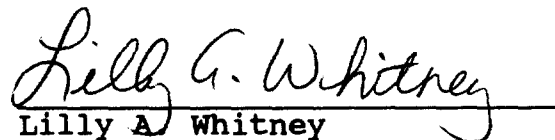
Gerald Stevens-Kittner, Esquire  
Peter H. Doyle, Esquire  
Arter & Hadden  
1801 K Street, N.W.  
Suite 400K  
Washington, D.C. 20006

John Primeau, President  
North American Catholic Educational  
Programming Foundation, Inc.  
1223 Mineral Spring Avenue  
N. Providence, Rhode Island 02904

Thomas A. Pyle, Executive Director/CEO  
Network for Instructional TV, Inc.  
11490 Commerce Park Drive  
Suite 110  
Reston, Virginia 22091

Charles McKee, President  
Shekinah Network  
14875 Powerline Road  
Atascadero, California 93422

Robert J. Rini, Esquire  
Stephen E. Coran, Esquire  
Rini & Coran, P.C.  
Dupont Circle Building  
1350 Connecticut Avenue, N.W.  
Suite 900  
Washington, D.C. 20036

  
Lilly A. Whitney